[The court was called to order at 1000, 24 August 2007.]

DEPUTY CHIEF JUDGE ROLPH: Please be seated. Good morning, counsel. We're here today to hear oral arguments in the case of *United States vs. Omar Ahmed Khadr.*

Is counsel for the government ready to proceed?

[Mr. Francis Gilligan, Government Appellate Counsel, presents argument.]

MR. GILLIGAN: Good morning, I'm Francis Gilligan and I'm assisted by----

DEPUTY CHIEF JUDGE ROLPH: One moment, Mr. Gilligan, is—- are counsel for defense also ready to proceed?

LCDR KUEBLER: Yes, sir.

DEPUTY CHIEF JUDGE ROLPH: Thank you. Mr. Gilligan, I do understand that you want to divide your time, 35 minutes, reserving 10 minutes; is that correct?

MR. GILLIGAN: Yes, sir. Yes, Your Honor.

DEPUTY CHIEF JUDGE ROLPH: You may proceed.

MR. GILLIGAN: I'm assisted here at counsel table by Major Jeff Groharing and Captain Keith Petty and Mr. Michael J. Edney.

DEPUTY CHIEF JUDGE ROLPH: Thank you.

MR. GILLIGAN: Your Honor, we ask this Court to hold three things:

First, that the judge erred in dismissing the charges without prejudice;

Second, that this Court has jurisdiction; and

Third, that Judge Rolph is appropriately the Deputy Chief Judge of the Court.

In 2006 after the *Hamdan* decision, Congress-- Congress set up a comprehensive scheme to have a full and fair determination of guilt or innocence concerning unlawful enemy combatants. As part of that scheme, they set forth the rules of criminal procedure, rules of evidence and substantive crimes. At the heart of that legislation is the question of jurisdiction and that's the key question in this particular case here. Part of this full and fair system set up by Congress was to grant the defendant, Mr. Khadr, the right to counsel, the right to call in witnesses, the right to cross-examine witnesses. And as I say at the heart of this is the question of jurisdiction.

Shortly after the *Rasul* case, decided in 2004, we have Deputy Secretary Wolfowitz issuing an order creating a Military Tribunal called, "The Combatant Status Review Tribunal." I'm going to call it the C-S-R-T, the military acronym for that is “c-sert.” He asked that those tribunals to determine who are “unlawful enemy combatants.” The definition of the term he used is this:

The term, "enemy combatant" should mean an individual who was part of or supporting Taliban or al Qaeda Forces or associated

forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. As a result of that order----

DEPUTY CHIEF JUDGE ROLPH: Mr. Gilligan----

MR. GILLIGAN: Yes, Your Honor?

DEPUTY CHIEF JUDGE ROLPH: Mr. Gilligan, I think you said that the memo asked the CSRTs to establish whether these individuals were "unlawful enemy combatants." Isn't it true they never used that term in the memo and refer only to "enemy combatant status"?

MR. GILLIGAN: Yes, and I will come back to that to show that the decision made by the CSRT showed only he was an enemy combatant. Judge, your right only that he was an enemy combatant, and of course, that's the issue we have here. Because we have the finding that is Appellate Exhibit 11 that you have in front of you which in paragraph 2, indicated that the tribunal determined by a preponderance of the evidence that Mr. Khadr was properly designated as an enemy combatant, as you said, judge. As defined in that memo I referenced to you.

Appellate Exhibit 11 also incorporates by reference, a document you have admitted here, and that is R-1. And in R-1, there is an individual determination that Mr. Khadr is an al Qaeda fighter and engaged in hostilities against the United States. The judge in

this case indicated that he did not have jurisdiction to hear the case because the finding I just mentioned, and as pointed out by Deputy Chief Deputy Judge Rolph, omitted the term "unlawful." It was not there. And he also indicated that he was not the appropriate judge to make that determination. So as I indicated, at the heart of this case is jurisdiction over the person. A very common decision to be made in many courts, and I suggest to you as Justice Frankfurter said, “It's the statute, it’s the statute, it's the statute.” And that's what it is.

So I think you have two avenues here to hold that the trial judge erred in dismissing the charges without prejudice. I'm going to divide my argument to you as to the error by looking at the statute we have here. The statute is 948a(1)(A)i and ii. And I'm going to refer them in the rest of my argument rather than small Roman numeral i and ii, as 1 and 2.

In 1, it says, an unlawful enemy combatant. The term "unlawfully enemy combatant" means: 1, a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents, who is not a lawful enemy combatant, including a person who is part of Taliban, al Qaeda, or associated forces. Importantly, and I'd like to circle this right here, in the disjunctive is the “or.”

You have two avenues here to decide did the judge err. Avenue number one is number 1, and I will talk about that. Avenue number two that I will talk about in a few minutes, is number 2, that is divided into an A & B. That is, “a person who before, on or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal,” that's A; or B, another competent tribunal.

As I said, the first approach we prefer you to take is that the judge erred in deciding that he was not a player in determining jurisdiction in this case. Now the determination of jurisdiction is not unusual. We can go back to tens of years in the court-martial practice. One of the first questions to be determined by the judge, “to be determined by the judge,” is the question of jurisdiction, and I suggest the judge in this case was the person to make that determination under 1. Under number 1.

Now why, why do I say that? We ask ourselves that. We know the judges, and you have seen the cases. Now we have a series of cases, does the military have jurisdiction over Reservists? Are their orders proper? Are they signed? Are they by an appropriate official? Or, in the case we've seen, the cases now before CAAF, was there a discharge before the person was charged in the case, therefore, there's no jurisdiction. And better yet, better yet, the one we've had for years from 1969 to 1987. Remember when an offense

was committed off post the judge had to make a decision as to whether it was service-connected using the 13 *Relford* factors? You notice I said, "the judge made the decision." You might want to say to yourself, well for 50 years, why did we have that judge making that decision? Because you can see the parallel between this comprehensive scheme set up by Congress and the Uniform Code of Military Justice. And let me point out the parallel----

DEPUTY CHIEF JUDGE ROLPH: May I interrupt you----

MR. GILLIGAN: Yes, sir.

DEPUTY CHIEF JUDGE ROLPH: ---- just briefly. From my reading of the record, Judge Brownback had a very specific concern, and I read it to be that in this new creature called, "Military Commission," Congress obviously intended to very narrowly define the jurisdiction of that forum and specifically, by using the term "unlawful enemy combatant," Judge Brownback interpreted that to be-- that determination to be a prerequisite to even the referral of charges to the Military Commission. Was he right in that determination? That the determination of unlawful enemy combatant status has got to take place and be solid before a Military Commission can even be convened?

MR. GILLIGAN: No, he was-- he was not. He was incorrect in that. That decision would have to be made before any evidence is introduced in the case in chief; but he was an appropriate individual

to make that decision. As I indicated, judges have been making that decision-- let me-- let me give you the statutory authority under the MCA, that is, the Military Commissions Act, as to why the judge has that authority to do that.

DEPUTY CHIEF JUDGE ROLPH: Well can I add to my question this point that I think he also hung his hat on, was that language that the CSRT determination of unlawful enemy combatant status would be dispositive of the issue for purposes of Military Commission jurisdiction, and did that not express clearly a congressional intent that that determination be made well ahead of time?

JUDGE FRANCIS: Mr. Gilligan, if I could, let me add to that. I mean -- isn't that interpretation by the judge consistent with Article 45 of protocol 1, and the language there that suggests that that determination has to be made prior to the trial?

MR. GILLIGAN: I would say prior to the trial, just as I answered Judge Rolph, prior to the introduction of the evidence in the case in chief. Let me talk about what the defense has raised here. And I think if nothing comes out of your decision in this case, is I cannot emphasize this enough, is Congress indicated that this Court should not use the sources of international law as a source of right to overturn the structure that they have in their particular case.

Now back-- I think the answer-- the way I'd like to answer that question, Judge Francis, is to go back to the statute again. That is, there are two ways to determine jurisdiction. Number 1, the judge does it under this one here [pointing to a large chart of Section 948a(1)(A) of the MCA, set up by the government for these proceedings.] You might want to say, and I think, Judge Brownback is saying, "Under-- where does it say the judge does it?" And then, number 2 that I'm going to talk about in a minute, if you want to move me forward I can. Number 2, has two parts to it. It has "the CSRT and other competent tribunals." Let me answer both questions this way here. I think what happens when you set up a new system, we're not all familiar with it. Let me draw some parallels for you then, because the parallels clearly answer your question.

What do we do in-- under the Uniform Code of Military Justice? You might ask yourself, "Well, where's it say the judge makes that initial determination of personal jurisdiction? Where does it say that?" We've been taking that for granted for 50 some years. You know where it says it? It says it in Article 39(a)(1). And pursuant to delegation from Congress, the Manual provides for that in 905(a), (b), and (c), and 907. Interesting because that language of 39(a)(1) is verbatim, is verbatim in 949d(a)(1)(A), it is verbatim.

That's-- and I didn't cite to you, you know, one of the great treatises on jurisdiction is by Jan Horbaly, and I will give a supplemental cite, it’s on file in the Yale Law School up there, showing that the judge is the person. It’s one of the first things you do in any case, is make that personal-- that decision as I say, it goes to the heart of this case, is that Congress did want to limit this to the question of, "who is an unlawful enemy combatant," and as I say, judges have been making that decision over and over again. And the fact that that decision would be made before the introduction of any evidence. If you want to apply the protocol, Article 45, I think it satisfies that if you go back and look at the language of that in the case.

DEPUTY CHIEF JUDGE ROLPH: So you say a Military Commission has presumptive jurisdiction over any case referred to it where it’s clearly alleged in the pleadings that the individual is in unlawful enemy combatant status; they've enjoyed presumptive jurisdiction until such time as jurisdiction was attacked by a motion to dismiss or some other method?

MR. GILLIGAN: Would you-- would you give me the question a different way?

DEPUTY CHIEF JUDGE ROLPH: Okay. Are you saying that a military tribunal has presumptive jurisdiction over any case referred to it in which the pleadings clearly allege the individual’s an

unlawful enemy combatant and they can presume they have jurisdiction until such time as it’s attacked through a motion to dismiss?

MR. GILLIGAN: Yes, I think they could.

DEPUTY CHIEF JUDGE ROLPH: Okay, how does that get back to Judge Brownback's decision that the decision on unlawful enemy combatant status, in his opinion, seems to be that it's a prerequisite to referral.

MR. GILLIGAN: Well, I-- I-- what you want to do as you look at the statute, is pretend, in which he did not do, is pretend you're not seeing 2 because of the disjunctive? You know,-- that, what he was talking about, he needed that determination from the CSRT and I think that's separate and apart. What 1 says going back to the old 39(a) says, is the judge makes that determination under 1. And as I indicated to you, the language is verbatim in the MCA as it is in 39(a). And it's also verbatim as that determination by the judge in 907, verbatim. And, substantially, verbatim in 905(a), (b), and (c). I mean to support the idea that he was the individual to make that determination.

Think about it this way. Let's assume that in a civilian case we have someone come in and it's a criminal case and the defense claims there’s not a proper-- there's an improper indictment or information. Clearly the judge then can go ahead and rule on that particular motion. But we suggest here that when a motion is made by

the judge on his own or by any of the parties that there's not jurisdiction, than the burden then is on the government to go ahead and prove the individual is an unlawful enemy combatant.

DEPUTY CHIEF JUDGE ROLPH: If the court-martial has presumptive jurisdiction over cases referred to it, would the appropriate language of unlawful enemy combatant status and the judge could consider that status anew if it's attacked by a motion to dismiss and go back to that language regarding CSRT determinations of status being dispositive for purposes of court-martial jurisdiction? The flip side of that argument is; if you did have a proper determination of unlawful enemy combatant status by a CSRT, it could not be attacked at a Military Commission; is that true?

MR. GILLIGAN: The statute says that. The finding of the CSRT is dispositive. Let me address CSRT in this case. Let me now go to point 2 and the CSRT. And when I talk about the CSRT, I want to divide that as to the question of jurisdiction, which is one point; and then the other point, that's pointed out in the briefs, is the question of Article 5. And I suggest to you, Senator Graham, had it right, that the CSRT, set up by Deputy Secretary Wolfowitz, was an Article 5 tribunal on steroids. I want to set that aside as to the question of Article 5. We know the purpose of Article 5, is to determine the question-- the purpose is to determine the question of treatment and status of an individual. But I want to move to your

question, what about the CSRT as being dispositive as to the jurisdiction in the case? Back again to what we had in Appellate Exhibit 11. In Appellate Exhibit 11, we have the finding he's an enemy combatant. In my Freudian slip really points out, and I guess what I was trying to show here, that I want to put it in enemy-- I mean "unlawful" into this. And let me show how that comes into play here; because then if you look at R-1, which was admitted on motion, in this idea of looking at R-1, is perfectly appropriate. Let's assume in a search warrant. The search warrant is deficient as to specificity of a place or person, what do all the courts, and I've mentioned this in my supplemental citations to you, what do all the courts allow you to do? To look at the document that's incorporated by reference.

Here R-1 is incorporated by reference. And what is R-1? R-1, the CSRT then has to go back to find in jurisdiction has to be an unlawful enemy combatant as defined in 1. And I suggest to you, here in the statute, you have number 1, a Congressional Determination that members of al Qaeda are unlawful combatants. Think about 9/11, what did we have? We have members of al Qaeda hijack commercial airlines and attack the World Trade Center and the Pentagon. Attacked, in other words, civilian targets.

And so the President-- Congress has made a group determination that members of al Qaeda are unlawful combatants. The

question you have and the one you rightfully asked, has there been an individual determination in this case, that Mr. Khadr at the CSRT was found to be an unlawful enemy combatant? Absolutely, yes. And why do we know that? Because what does R-1 say? R-1 says he was an al Qaeda fighter. That individually he was a member and engaged-- remember we have a little difference between the language in the Wolfowitz memo, but here, we have an individual who's intentionally materially supporting activities against the United States. Very clearly, what was said he was involved with a 4 or 5 hour firefight, captured at the end of that, given medical attention.

DEPUTY CHIEF JUDGE ROLPH: Isn't there a little bit more than a little difference between the Wolfowitz memo language as to who qualifies as an enemy combatant and the language in the MCA as to who's an unlawful enemy combatant? And here's my concern, is that this is a CSRT done in 2002.

MR. GILLIGAN: Yes.

DEPUTY CHIEF JUDGE ROLPH: Before the Military Commissions Act is even thought of or passed. They obviously were not applying definitions from the Military Commissions Act or could even contemplate what those would be. The language that is in the Wolfowitz memo does not track into the MCA. In fact, there are significant differences, as pointed out in the briefs submitted by Mr. Khadr's attorneys, and the argument they've made is that he was

determined-- if he was determined to be an unlawful enemy combatant, it was under a standard that's less exacting that's contained in the MCA today and we should not honor that. How do you respond to that?

MR. GILLIGAN: There are differences. There's a difference in terms of degree of association. 1 requires a determination of unlawfulness, another does not. You have those differences. Our preference, our preference is that the military judge has the ability to make that determination. He can go back and look at the CSRT and make that determination.

JUDGE FRANCIS: So, are you backing away from the argument then that the CSRT determination is dispositive is this case?

MR. GILLIGAN: Our preference, Judge Francis is to go to 1 and not to go to 2(a). We also suggest, because there will be people looking over your shoulders; there's the possibility of doing alternative holdings on both. Let me suggest, (a) why the alternative holding would work, and also suggest why our preferences for 1, that the judge is the appropriate individual to make this determination. This defendant here, as we've mentioned in our brief, has made a number of filings in the civilian courts, *Habeas* actions and civil actions. And if you look at these filings, the complaint, and he also has a petition pending before the Supreme Court now, to be a party to the Algerian case, Mr. Boumediene.

The argument is that the CSRTs, and this is why we like 1; the CSRT does not guarantee fundamental due process. It doesn't give him notice at the CSRT. The burden is on him to show that he's a lawful combatant. He doesn't have a lawyer, he has a rep. He doesn't have access to the evidence, he doesn't have the right to call witnesses and to cross-examine witnesses. If you----

DEPUTY CHIEF JUDGE ROLPH: And in 2002 he doesn't know that it will subject him to criminal jurisdiction. All he thinks, right, is that this he's being held "to determine my status under the Geneva Conventions." Is that true?

MR. GILLIGAN: Yes, that’s right. That's why we’d like to go with number 1 in answer to that because if-- if you rule in favor of the government on our first option here, think about it for a minute; the defense gets what they want. They get notice; they get a right to counsel; they get a right to examine the evidence, including the classified evidence; they get a right to call witnesses; and the list goes on and on. The only thing that they said, "Oh, we want to have that type of hearing,” and you could take judicial notice of their pleadings. “We want to have all those rights. We just don't want this judge.” And we suggest to you, back to your question, Judge Francis, as long as that determination is made before the introduction of any evidence, he gets exactly what he's asking for. In his civil filings, that, "yes," he wants to have a hearing before

a judge, as I said. Just not this judge. If he does get a hearing before Judge Brownback, he will get all those rights he's asking for in these civil filings, Judge Francis.

JUDGE FRANCIS: Well, it sounds like, I mean the way I'm interpreting your argument now, is that, based on the differences that were highlighted by Judge Rolph, and all of the differences between the CSRT hearing and the commission hearing, that you've just made the defense argument for them in terms of, "hey, we cannot rely on the CSRT determination for determining whether this individual is an alien unlawful enemy combatant versus just an enemy combatant."

MR. GILLIGAN: I----

JUDGE FRANCIS: So I guess it sounds like you're abandoning that portion of your-- the government's argument; I mean is that----

MR. GILLIGAN: Well, I think that-- let me say, we're not.

JUDGE FRANCIS: Okay.

MR. GILLIGAN: I think he's done-- let me give you-- let me answer that why we're not. Because we indicate that you look at not only the finding, "enemy combatant," and as we pointed out at the beginning here what's missing, "unlawful", how do we fit in unlawful? We fit in unlawful, just as you can take judicial notice that the KKK engages in violence, you can take judicial notice that members of al Qaeda engage in violence and as I gave you the example of 9/11, target civilians. So we know, and Congress has made that

determination so we fill in the group portion of the CSRT, you know the language is missing, “unlawful” so the group portion is filled in what, by Congress, that the organization is unlawful. And how do we do the individual determination that Mr. Khadr is the unlawful enemy combatant? We fill that in with our R-1. It’s very clear he’s a member of -- he’s an al Qaeda fighter engaged in hostilities against the United States. So when-- when-- and also we had the Presidential determination, 2002, 2007, which says that al Qaeda is an unlawful organization and I suggest to you----

DEPUTY CHIEF JUDGE ROLPH: Yes, but actually, it doesn’t-- doesn’t say that does it?

MR. GILLIGAN: It says-- Yes----

DEPUTY CHIEF JUDGE ROLPH: It says “Taliban.” Members of the Taliban are unlawful enemy combatants. In fact-- and goes on to-- in relation to al Qaeda just too simply say that Geneva Conventions do not apply to members of al Qaeda. It never states, if I read it right, that members of al Qaeda----

MR. GILLIGAN: Let me----

DEPUTY CHIEF JUDGE ROLPH: ---- are unlawful enemy----

MR. GILLIGAN: Let me come back in rebuttal and respond, just check that out as I do on that. But I think here though that what you can see is you can-- if Judge Brownback would go back and examine these documents, Appellate Exhibit 11, and R-1 on their face, they

satisfy both the group determination that members of al Qaeda, al Qaeda is an unlawful organization and that's a congressional determination. We have that in 1, 2. It says here, "a person who is engaged in hostilities," and you might say why did they put the parenthetical in there; because were looking not looking only at this conflict but future conflicts.

DEPUTY CHIEF JUDGE ROLPH: Well couldn't you read that same paragraph to mean not that Congress has made a group determination that members of the Taliban and al Qaeda are unlawful enemy combatants, but that individuals that happen to be members of Taliban or al Qaeda who are also engage in hostilities and purposely an materially supported hostilities could be considered unlawful enemy combatants; that's it's qualifying language, not dispositive language?

MR. GILLIGAN: Okay, well you could do that. I suggest to you though that here we just have al Qaeda.

DEPUTY CHIEF JUDGE ROLPH: I'm just----

MR. GILLIGAN: I mean the facts----

DEPUTY CHIEF JUDGE ROLPH: I'm just concerned----

MR. GILLIGAN: ---- you have here, is an individual who's a member of al Qaeda. Found to be an al Qaeda fighter and satisfies the language here of purposefully and materially supported hostilities. It's right in R-1 itself. That's why I say, "yes,"

back to Judge Francis, can we look at the CSRT being dispositive? I think when you look at both documents it clearly is going to be dispositive as to the question of jurisdiction.

We prefer though----

DEPUTY CHIEF JUDGE ROLPH: Does that-- does that dispositive jurisdiction satisfy-- satisfy basic fundamental notions of fairness under the-- under the Constitution under the Military Commissions Act; that this individual is-- is for all purposes an unlawful enemy combatant; he can never challenge that status at his own military commission?

MR. GILLIGAN: I think what we'd like is go to our preference, number 1. I think that what he-- he meets clearly-- we have a determination, as I mentioned when I cited Senator Graham, a determination that satisfies Article 5. As I indicated the international law is not to be used as a source of rights. Congress was very clear on that and the three sections we cited there in our briefs.

JUDGE FRANCIS: Which sections are those?

MR. GILLIGAN: This is-- if you look at it it's 948b(f), 948b(3), and section 5, all indicate that. If there's anything I can emphasize today is the structure set up by Congress should not be changed by using international law as a source of rights. Setting

that aside, let me just suggest this, that the CSRT, I suggest to you, did satisfy; that he's not entitled to an Article 5 Tribunal.

Think about that, he's not-— what does he have to show? He's got to get over these hurdles. Number 1, he's got to show it's an appropriate international conflict. The Supreme Court in *Hamdan* said it was not. Number 2, he has to show is there some doubt as to his status. There was no doubt as to his status that he was a person and you can ask the defense, are they claiming that he was wearing a distinctive uniform and following the laws of war? They have never claimed that. And also even if you go to protocol 45, if he claims to be a POW, he to this day has never made that claim to be a POW. So, I suggest to you if you want to look at Articles 4 and 5, I think the CSRT here more than satisfies it. Here we have a three person tribunal making the decision. Some countries only have one. Some countries only have one making that decision.

Back to your question, I think that satisfies that determination for domestic law.

JUDGE FRANCIS: Let me back up to your comment that I believe cannot—- for the persons that are being tried by military commission cannot rely on the Geneva Conventions for establishing a source of rights. I'm looking at 948b(g), and what I have with that is, the Geneva Convention is not establishing a source of rights, but the very language says that no alien unlawful enemy combatant can rely

upon those Conventions as a source of rights. And isn't that the threshold determination that we're looking at here? So you never get to that second part until we satisfy the issue before this Court in terms of whether or not this particular individual is an alien unlawful enemy combatant. Once he is, then I suppose that kicks in. Until we get there, why is he not allowed to rely upon some of the other sources of rights that are out there?

MR. GILLIGAN: If you believe that's the case, I suggest to you that the CSRT will meet the requirements of Article 5; because he was not entitled to an Article V Tribunal, because of the steps he has to go through. He has threshold steps that he has to show you and I suggest that he cannot meet any of the three thresholds I gave you.

DEPUTY CHIEF JUDGE ROLPH: Again, here's my concern with that statement; is that in 2002, Mr. Khadr goes before a CSRT believing its only function is to determine his status for purposes of application of the Geneva Convention. He has no-- no clue the Military Commission Act will later subject him to criminal jurisdiction for violations of the law of war based on that status determination. So, at that time in 2002, had he known that what was at stake was a potential military commission at which he could face the death penalty, is it likely that he may have more actively participated in his own CSRT process or viewed it in a different

manner than what he did, which apparently was-- essentially decide not to participate and let the chips fall where they would?

MR. GILLIGAN: I think so. He may have taken a different stance altogether. But that's why our preference here, and I think you made the comment that the defense certainly made it in their briefs, it looks like the government has abandoned the CSRT as being dispositive. We ask that as our second. Our first alternative here is we said it very clearly, that Judge Brownback was an appropriate judge to make the determination, Judge Francis, as to whether he was an unlawful enemy combatant.

If that determination is made by him, all these fundamental due process rights they'd like to have, he gets that. And I suggest to you he even gets more because he gets a verbatim record; he gets an appeal to you; an appeal to the Court of Appeals; an appeal to the Supreme Court. I suggest that's much more than fundamental due process would require in any case.

DEPUTY CHIEF JUDGE ROLPH: So-- are-- is the government conceding that while an unlawful enemy combatant status determination might be dispositive under the Military Commissions Act, an enemy combatant determination would not be dispositive?

MR. GILLIGAN: I would say the determination here, if you will look at both documents, a determination of the CSRT as the finding

incorporated by our R-1, is dispositive to show that he's an unlawful enemy combatant.

DEPUTY CHIEF JUDGE ROLPH: Okay, they never said that he's an unlawful enemy combatant, so if he's just an enemy combatant, he could be lawful or unlawful; correct?

MR. GILLIGAN: He could be, but in this case here, when you put both documents together, he's clearly an unlawful combatant. He's not in uniform. He's----

DEPUTY CHIEF JUDGE ROLPH: But he's not prevented from going into a military commission. If it's not dispositive and raising a motion to dismiss on the grounds that, "I'm a lawful combatant," and try to prove that up.

MR. GILLIGAN: Yes, I think if you rule that-- on our preference for 1, I think it stands to reason that he may very well come in and challenge jurisdiction and hold it's not dispositive because there are certain deficiencies. Let me switch over in just the little bit of time that I have left and talk about the jurisdiction of this Court. And one of things I might mention to you; were talking about Judge Brownback being able to make the decision as to jurisdiction. And that's an inherent right of the Court. Just as you're going to make that decision as to your jurisdiction, that's the inherent right of the Court. The other thing I want to mention too as to the

delegation of authority; I just want to point out to you that we have an appropriate delegation of authority----

DEPUTY CHIEF JUDGE ROLPH: Mr. Gilligan, your time is up.

MR. GILLIGAN: I'd like-- there's two things that I'd like you to do in summary here, is to go ahead and hold that the judge erred in dismissing the charges. Our preference is for 1, or to go with alternative holdings in the case and also hold that you have jurisdiction and you're appropriately the Deputy Chief Judge. Thank you very much.

DEPUTY CHIEF JUDGE ROLPH: Lieutenant Commander Kuebler, you may proceed with your comments.

LCDR Kuebler: Sir, before proceeding with the remaining of the argument, Appellee requests a brief recess.

DEPUTY CHIEF JUDGE ROLPH: How much time do you need?

LCDR KUEBLER: Approximately 15 minutes, sir.

DEPUTY CHIEF JUDGE ROLPH: Okay, the Court will stand in recess for 15 minutes.

[The court recessed at 1041, 24 August 2007.]

[The court was called to order at 1055, 24 August 2007.]

DEPUTY CHIEF JUDGE ROLPH: Please be seated. Lieutenant Commander Kuebler, are you prepared to proceed?

LCDR KUEBLER: Yes, sir.

DEPUTY CHIEF JUDGE ROLPH: You may.

LCDR KUEBLER: Thank you, sir.

[Lieutenant Commander William Kuebler, Defense Appellee Counsel, presents argument.]

LCDR KUEBLER: May it please the Court. I'm Lieutenant Commander William Kuebler, and I will be addressing the Appellee's motion to abate proceedings and motion to dismiss. My co-counsel, Mr. Nathan Whitling, will be addressing the merits of the government's appeal. With us at table-- at counsel table, are Mr. Dennis Edney, and Ms. Rebecca Snyder, who have also-- who are also part of the defense team.

This Court has before it a historic opportunity. It's no secret that the Military Commissions have drawn criticism both at home and abroad. The Military Commissions Act is a controversial piece of legislation enacted long after Appellee's alleged offenses, in an ad hoc effort to deal with the Supreme Court's invalidation of the Military Commissions in *Hamdan v. Rumsfield*. This Court, beginning with the issues presented today, has a chance to begin to interpret and apply that statute in such a way as to restore the credibility of the United States and the perception of its commitment to the rule of law.

Appellee's motions do not present merely technical questions. Like the Military Commissions Act, this Court was established on the fly in response to the military judge's unexpected

dismissal of charges against Appellee on 4 June 2007. The fact is that although this Court may have technically, in some sense existed, it was not ready to hear the government's appeal, and as a result the government had to buy time to establish this Court so that it could. In its haste to set up the Court, the government made critical mistakes that leave this Court with no choice but to abate its proceedings or dismiss the government's appeal.

Now, these events are the natural result of the government's conscious choice to rush forward with these prosecutions rather than take time to ensure that the military commissions system, including this Court, was firmly established and in place before they did so. Thus, they assumed the risk of an adverse judgment in the court below that they would be unable to appeal. This Court now has the opportunity to ensure that the next round of Military Commission prosecutions are not plagued by the same procedural failings that have crippled this one. It should abate or alternatively dismiss the government's appeal.

With respect to the motion to abate, I will argue that the Deputy Secretary of Defense lacked the authority to appoint the judges of this Court. With respect to the motion to dismiss, I will offer two arguments:

First, the government's appeal was outside the mandatory five-day jurisdictional limitations period for an interlocutory appeal under the Military Commissions Act;

Second, even if the government's appeal was timely, it was not filed in accordance with the Rules of Court, as required by R.M.C. 908c(11), as there were no validly promulgated rules on the date that the government's appeal was filed.

Turning first to the motion to abate, we start with the proposition that this is a Court of special and limited jurisdiction. Its authority is entirely a function of the statute and the regulations that authorize its creation. If that statute and those regulations are not followed to the letter, it has no power to act. Now the Military Commissions Act, which was passed into law on October 17th 2006, says plainly that the Secretary of Defense shall assign the judges to this Court. The Manual for Military Commissions, promulgated by the Secretary of Defense in January of this year, provides also that the Secretary of Defense shall appoint the judges of this Court; and the regulation for trial by military commission, Chapter 25 thereof, similarly provides that the judges of this Court shall be appointed by the Secretary of Defense.

I was struck by something that Mr. Gilligan said in his argument in harking back to Justice Frankfurter, "It's the statute, it's the statute, it's the statute." Well, the statute here is

clear. But, moreover, it's "the regulation, the regulation, the regulation," and "the manual, the manual, the manual." All three unambiguously provide that the Secretary of Defense and not the Deputy Secretary of Defense must appoint the judges of this Court.

Captain Rolph, you yourself expressed this sentiment in an email to a Department of Defense lawyer on 11 July of this year, and you said, and I quote, "As you know, Section 950f of the Military Commissions Act of 2006, states that the Secretary shall assign Appellate Military Judges to a Court of Military Commission Review," and you requested evidence and validation of your appointment-- appointments. Well, you were correct, sir, in expressing that concern; because the Secretary's power to appoint judges to this panel under the Military Commissions Act, is non-delegable.

Now how do we know that? We know that in part because in another section of the Act, 10 U.S.C. Section 949a(c), Congress expressly authorized the Secretary of Defense to sub-delegate his rulemaking authority. Under a well established body of Supreme Court case law, the fact that Congress expressly allowed him to delegate the rulemaking authority and withheld that in connection with his appointment power creates a strong negative inference that Congress intended to withhold that authority from him.

JUDGE HOLDEN: Well counsel, let me ask you a question about your negative inferences. The Secretary of Defense's delegation memo

permits him to delegate to the Deputy Secretary of Defense, in fact in this particular case, any power that he exercises except those expressly prohibited by law; is that correct?

LCDR KUEBLER: Actually it says, specifically prohibited by law, Yes, sir.

JUDGE HOLDEN: Okay, expressly. So, since –- unless there's a prohibition that you can find in writing that someone wrote, like in the Manual for Courts-Martial, where a convening authority cannot delegate his power, where can you point to in the law that there's a specific or express prohibition against the Secretary of Defense delegating this power? And, if he can't delegate this power, how do you determine which powers he can and cannot delegate?

LCDR KUEBLER: I believe you were referring to 10 U.S.C. Section 113, which is the general authority giving the Secretary of Defense to delegate his powers to subordinate officials of the Department of Defense. And just to begin with a premise to your question, sir, I think there is an important distinction between the words, "expressly," or "explicitly," and "specifically." 10 U.S.C. 113, does not say that the Secretary has this power and must explicitly, prohibit that law from exercising and also it says, "specifically." Now Congress has specifically withheld that authority under the Military Commissions Act.

JUDGE HOLDEN: My question to you counsel is, do you have a place in the law where it says the words, “The Secretary of Defense cannot delegate this power to a subordinate”?

LCDR KUEBLER: No, sir. We believe that the negative inference created by Congress' enactment in the provisions I referenced earlier in my argument with respect to the rulemaking authority, and the different treatment of the rulemaking authority with respect to the-- in comparison with the appointment authority, creates that strong negative inference that—- that that constitutes that specific prohibition on the Secretary’s authority to sub-delegate in this case.

DEPUTY CHIEF JUDGE ROLPH: But the flipside of that argument is that the expressed statutory language in 10 U.S.C. 113(d) that Congress gave this power to the Secretary to specifically delegate to the Deputy Secretary. They were obviously aware of that statute when they enacted the Military Commissions Act later after that statute. And then you have that followed by the DOD directive, which makes it very clear and even cites to 10 U.S.C. as a reference, that they’re doing it pursuant to that previous express congressional delegation authority. In light of that express authority, why should we infer any negative authority to the contrary?

LCDR KUEBLER: Well sir, I’d like to answer the second part of that. First of all, the DOD directive cannot delegate any authority

or create any rights or obligations that the Secretary doesn't always have, so we have to go back to the statute and what Congress intended in passing the statute. Now you're right, I think the presumption has to be that Congress knew that 10 U.S.C. 113 was out there, and if it did and we make that assumption, then it was unnecessary for them in 10 U.S.C. 949a(c), to make the express authority to sub-delegate international rulemaking authority. That language becomes mere surplusage, if we accept the argument you just articulated, sir.

JUDGE FRANCIS: Maybe that's exactly what it is; maybe it's just redundant of the existing authority.

LCDR KUEBLER: Or maybe it's consistent with the well established Supreme Court case law and we cite the *Cudahy* case and the *Giordano* case in our papers. Maybe it is, as the Supreme Court says, similar language in connection of the operation of other departments in the federal government, evidence of Congress' intent to withhold that power from the Secretary in this case. And----

JUDGE FRANCIS: But in those cases you cite, I just wanted to point out, am I wrong in stating that the delegations in those cases were to individuals who clearly were not mentioned in any prior statutory authority as somebody who could act under the circumstances involved in those cases? Where as here, you have an express delegation from Congress of the power to delegate and the actual delegation -- actual comment in a DOD directive that allows the

deputy secretary to act for Secretary Gates. I'm confused as to how those cases are even applicable here.

LCDR KUEBLER: Well, I think actually *Cudahy* and *Giordano* both follow the same model generally present here. You had in both situations a general delegation in one case with the attorney general and the other case to the administrator of the wage and hour division of the Department of Labor, to delegate their -- to exercise the authority of their office through subordinate officials. And then in both cases you had a specific statute -- in the *Giordano* case with the authority to authorize wiretaps, in *Cudahy* with the authority to issue subpoenas *duces tecum* that didn't mention the relevant parties within the text of those considered provisions. And what the Supreme Court did is that under the principle of *expressio unius est exclusio alterius, it* said that Congress' failure to include those individuals in the express delegation was strongly with a congressional intent to withhold the authority in the situation.

That's precisely the model here with one additional -- with one exception, it's even a stronger inference here, because within the same Act, the Military Commissions Act, Congress expressly delegated to the Secretary the authority to delegate his rulemaking power to the Secretary of Defense. So it creates even a stronger inference that Congress intended to withhold that authority to appoint the judges of this Court.

JUDGE FRANCIS: Counsel, you've made a distinction in your argument when looking at 10 U.S.C. 113, between the words "specifically" and "expressly." I take it, for your argument to work you have to define "specifically" to include inferences, which seems to be a -- almost a nonstarter. How do you get there?

LCDR KUEBLER: Well sir, it comes back to point out that I think the terms "explicitly" and "specifically" have different meanings. I think -- Congress has specifically, with respect to the case of appointment of judges before this Court, withheld the power. It has not done so explicitly, or expressly, but it has specifically.

JUDGE FRANCIS: But to get to your argument, you have to make some inferences, and as a matter of fact, as you are making your argument, you are arguing inferences from the fact that they did it in one section, but not another.

LCDR KUEBLER: Correct, sir.

JUDGE FRANCIS: How do I get from an inference to specifically? I mean, that's essentially what your argument is-- that while that delegation to the DEPSECDEF was not specific-- it was specifically precluded by the MCA language because, inferentially, we've got a delegation of one portion but not under another.

LCDR KUEBLER: Yes, sir, that's correct. My argument depends upon the proposition that specific can arise through inference, and it does so in this case. Now to wrap up this section of the

argument, it’s more than just again a technical matter here. There is a good reason why Congress would have wanted to withhold this authority, and that is because the Military Commissions Act contemplates the appointment of a mixed panel of civilian and military judges.

Now, under the jurisprudence interpreting or applying the appointments clause, specifically the *Ryder* case, it would be a violation of the appointments clause for someone other than the department head himself, the Secretary of Defense, to appoint a civilian judge to this Court. And so it makes sense that in allocating this power and deciding who could exercise it and who couldn’t exercise it, Congress would want to safeguard against the possibility of this power being inadvertently delegated to a subordinate official in a manner that might render appointments to the Court unconstitutional. So it's not simply a matter of the language, there’s also a legitimate justification and rationale for why Congress would’ve made that choice.

Now as a result of the defect in this panel's-- or in the Court’s appointments, in fact that you were not appointed by the Secretary of Defense, we believe that you are not-- do not have the authority to sit on this Court, and that your choice is limited to abate your proceedings. However, if the Court decides that it does have jurisdiction to sit, it must dismiss the government's appeal.

And this is because the government failed to file its appeal of Judge Brownback's initial ruling within the 5 days prescribed under the Military Commissions Act for the taking of an interlocutory appeal by the government. As a result, this Court's jurisdiction is limited to the question of whether Judge Brownback abused his discretion in denying the government's motion for reconsideration, which he decided on June 29th of this year. And in making that decision, this Court is limited to the question of whether or not there was a proper basis for reconsideration.

This Court's own rules acknowledged that the legitimate basis for a motion for reconsideration is the existence of new facts or new law. Well the government presented no new law here and, in fact, based on the record as we've seen it materialize through the judicial disclosures that have come out in this case, it's very apparent that the Court was not prepared, as I said at the outset of my argument, to hear this appeal on the 4th of June. And so the government in effect had to buy time by filing a motion for reconsideration to give itself the time to set up this Court, and as a result it violated the 5 day period under the statute.

JUDGE FRANCIS: What about *Ibarra*?

LCDR KUEBLER: *Ibarra*, sir, we think is distinguishable. Whatever else may be said about *Ibarra*, it does not control the outcome of this case for at least three reasons. First of all,-- or

I should say for at least two reasons. First of all, *Ibarra* dealt primarily with a rule-based extension. The time period at issue in *Ibarra* was a 30-day limitations period under Federal Rule of Appellate Procedure 4. Now that is, of course, a judge-made judicially promulgated rule-- the Federal Rules of Appellate Procedure are-- and so what the *Ibarra* rule stands for is the proposition that the Courts----

JUDGE FRANCIS: You're indicating then that the 30-day limitation that was at issue in *Ibarra* does not stem from statute?

LCDR KUEBLER: There was a statute, 18 U.S.C. 3731 also applied in that case; however, 18 U.S.C. 3731 contains some very unique language that's not present in the Military Commissions Act.

JUDGE FRANCIS: But it had the 30-day rule that was at issue in *Ibarra*; did it not?

LCDR KUEBLER: It contained a 30-day limitations period, but it had some very interesting language on the end that said that the provisions of this statute shall be "liberally construed." And what we believe that means is that Congress, in enacting that particular provision, recognized that it was legislating with respect to these matters, but essentially contemporaneously with the Courts. The Courts had-- or the federal courts had the independent rule making authority, as evidenced by their promulgation of Federal Rule of Appellate Procedure 4. So there is some degree of, or at least

evidence of a congressional desire to defer to the Courts in establishing its own timelines. And so what you really had being construed and applied in *Ibarra* was this rule-based limitations period, and----

JUDGE FRANCIS: Wasn't the ruling of the Supreme Court in *Ibarra* much broader on its terms than that? I mean, it said there is one general rule for all motions for reconsideration. It did not limit itself to just the interpretation of the rule under 18 U.S.C. 3731.

LCDR KUEBLER: I think it would be an overreading of *Ibarra* if it were meant to apply to anything more than government appeals in connection with-- government interlocutory appeals in connection with federal criminal proceedings.

JUDGE FRANCIS: Isn't that what this is?

LCDR KUEBLER: Well, this is-- I don't think this is a federal criminal proceeding. Now the *Ibarra* rule has been followed in military case law and I'll come in a moment to why we think the congressional enactment essential trumps application of *Ibarra* in this case. But the other point I want to make about *Ibarra* is that in terms of fashioning this judge-made rule-- this judge-made extension and going through the policy justifications, therefore, *Ibarra* relied upon two previous Supreme Court cases, *Healy* and *Dieter*, and what these cases talk about is the idea that there are important interests in judicial economy, not overburdening the

Appellate Courts with unnecessary appeals and so forth, that militate in favor of a rule like *Ibarra* that provides that time periods are tolled during pendency of motions for reconsideration. But the assumption in those cases is that you have motions for reconsideration filed in good faith. And in fact, the *Ibarra* Court at the very conclusion of the opinion, expressly reserved the question of whether or not the rule would apply in circumstances where an appeal was taken on a motion for reconsideration that was filed for reasons other than in good faith. Now----

DEPUTY CHIEF JUDGE ROLPH: Let me stop you there----

LCDR KUEBLER: Yes, sir.

DEPUTY CHIEF JUDGE ROLPH: Because, that's a pretty pointed argument that you're making and casts a fairly negative light in the way that the government counsel that started this whole process through the appellate system, and specifically I read their complaint to be that the judge raises the motion *sua sponte, that they*'re never given the opportunity to present evidence on the motion, that the reconsideration asked him specifically to consider evidence and specifically to consider the President's memo, the Wolfowitz memo, and that they didn't hear back from Judge Brownback until the 29th of June, in a fairly lengthy, detailed ruling, if you will, that he was denying the reconsideration.

And then I want to add this issue and ask you to comment on it. How is not that process totally consistent with our idea that we want to exhaust remedies before we start taking appeals and judicial economy as just a fundamental notion? Don't we want to have a fully developed record to give to the judge, the trial judge, the opportunity to thoroughly and fully convince-- or convince himself that he made the right decision, and then send it up on appeal and put us in a much better posture to decide the issue one way or the other?

LCDR KUEBLER: Well sir, let me answer your second question first. Those are precisely the reasons that underlie the *Ibarra, Dieter*, *Healy*, rationale for providing for tolling of limitations periods in connection with motions for reconsideration. The problem is that that is a judge-made rule and under the *Bowles* case, which was decided by the Supreme Court 10 days after Judge Brownback issued his ruling in this case, the Supreme Court reaffirmed the proposition that statutory appeal deadlines are mandatory and they are jurisdictional. So, even if those policy justifications exist, sir, and they may be valid policy justifications, what Congress is saying---

JUDGE FRANCIS: Did *Bowles* overrule *Ibarra*?

LCDR KUEBLER: Well, sir, again, we don't think that *Ibarra* applies here for the reasons that I've discussed, but to the extent

that there is any inconsistency, it is our position that *Bowles* and not *Ibarra*, would control the outcome in this case.

JUDGE FRANCIS: Weren't there some very important differences between *Bowles* and *Ibarra*? I mean *Bowles* by its language said we are dealing with civil cases only, not a criminal cases. And regardless of how you characterize this, it is a criminal proceeding. And more importantly, I think, in *Bowles* weren't they looking at a decision by the lower Court that actually on its face would have extended specifically the time within which to submit whatever it was, an appeal, versus tolling the time period from which the time to submit an appeal ran, which was addressed in *Ibarra*?

LCDR KUEBLER: Yes, sir. There's certainly a different set of facts, but the reasoning underlying *Bowles* applies with equal force here and it's based upon Congress' power to limit the jurisdiction in federal courts. Where Congress has said----

JUDGE FRANCIS: Isn't that what 18 USC 3731 did----

LCDR KUEBLER: But the Cong----

JUDGE FRANCIS: ----in *Ibarra*?

LCDR KUEBLER: Yes. But Congress certainly didn't act with the degree of emphasis in 18 U.S.C. 3731. Again, the situation where Congress knows that the federal courts are simultaneously promulgating their own rules of conduct and proceedings, here they acted with -- with unmistakable clarity. And just one final point on

this. If, Congress in the-- or the Military Commissions Act says that the procedures of Military Commissions are based roughly on--

I see my time. May I briefly conclude, sir, working through this point?

DEPUTY CHIEF JUDGE ROLPH: You may. Yes

LCDR KUEBLER: Has said that the procedures for Military Commissions are to be based roughly upon procedures for courts-martial. Well, if we look at the analogous statutory provision governing interlocutory appeals in courts-martial, specifically Article 62 of the Code, we see that Congress with Article 62 has chosen to provide no limitation period as to the date. It simply says that the government shall diligently prosecute interlocutory appeal. Here, in -- in establishing the analogous part or the counterpart of that process for Military Commissions, Congress has specifically and emphatically said, the government is subject to 5 days.

Now this court must give that-- that differentiation that deviate-- or that deviation from the norm a significance. And if it simply applies the *Ibarra* rule, it's not affording the appropriate significance to that-- to that conscious-- presumptive conscious choice by Congress to elect a different rule.

JUDGE FRANCIS: And the distinction you see between the MCA language and 18 U.S.C. 3731 is the addition in the latter statute of language to the effect that it should be liberally construed?

LCDR KUEBLER: Yes, sir.

DEPUTY CHIEF JUDGE ROLPH: Thank you, Commander.

LCDR KUEBLER: Thank you, sir.

DEPUTY CHIEF JUDGE ROLPH: Mr. Whitling?

MR. WHITLING: As my colleague mentioned, my name is Nathan Whitling. I'm a Canadian lawyer. I'm with the Edmonton law firm of Parlee McLaws, and I'll be addressing the merits of the appeal today.

We're asking this court to dismiss this appeal and to affirm Judge Brownback's dismissal of the government's prosecution of the Appellee, Mr. Khadr, on the basis that the Military Commission did not have jurisdiction over Mr. Khadr.

Prior to turning to the legal issues, I'd just like to make a couple of brief comments with respect to the facts set out in the government's case. I would note that the majority of the statements that are contained in the statement of facts are not the findings of any court. They are, in fact, the allegations that the government hopes to prove at a future trial. We just wish to emphasize that those allegations are not admitted, although we've not responded to all of them in detail.

The facts that we would emphasize for the purposes of this appeal are simply the following. Mr. Khadr has never been found to be an unlawful enemy combatant, either by a CSRT or by any other competent tribunal; nor could such determination have been made before the CSRTs for the simple reason that no such determination was requested, and such a determination would have been beyond the mandate and the procedures of the CSRTs as they then existed.

The other point I would argue, which I will return to later, is simply to emphasize that all of the acts which are alleged to have been committed by Mr. Kadhr, were alleged to have been committed when he was 15 years of age and younger. In our summation, that's also a significant point for the purposes of this Court's jurisdiction.

As the issues on this appeal are primarily questions of statutory interpretation, you will be aware, of course, that we refer to several canons of statutory construction in our submissions; and the one I'd like to emphasize at the outset, which my colleague referred to earlier, is the rule of strict construction of military jurisdiction, which is reflected in such cases as the *McClaughry* case and related cases. This appears at page 7 of our brief. You'll recall that in this case it was held that a military court's jurisdiction must appear affirmatively and unequivocally from the statute. There are no presumptions in favor of its jurisdiction. It

is not sufficient that the jurisdiction may be inferred argumentatively from its averments. In our respectful submission, that rule provides a complete answer to the arguments that are advanced by the government on this appeal. The fact is-- and I believe as Mr. Gilligan very fairly noted, there is nothing in the first clause of 948a which indicates that the Military Commission has the jurisdiction to make that determination.

DEPUTY CHIEF JUDGE ROLPH: I'm going to ask you the same question I asked Mr. Gilligan and that is, like most courts-martial there is presumptive jurisdiction based upon the pleadings of the parties and specifically in this case, where they clearly pled that he was an alien unlawful enemy combatant. Obviously, your client was on notice of those pleadings and essentially Judge Brownback, as most trial judges, was he entitled to take notice of that and presume he had jurisdiction over Mr. Kadhr? The flip side of that question is, is an unlawful enemy combatant status determination a prerequisite to referral of charges?

MR. WHITLING: The latter point to certainly our position. We submit that it is a prerequisite to the referral of charges. That is a point which Judge Brownback made and he said, essentially, if the government is correct, then my determination has to be *nunc pro tunc*, it would have to apply all the way back to the date of the referral.

DEPUTY CHIEF JUDGE ROLPH: Let me just ask you this, then. If that is in fact the case, why-- why do the Rules for Military Commission have a procedure to raise a motion to dismiss for lack of jurisdiction?

MR. WHITLING: Well, certainly the rules create a right to have motions and there's certainly a general provision which says there can be a motion to determine the court's jurisdiction. And that's what occurred in this case, there was a motion to determine the court's jurisdiction and Judge Brownback ruled on that motion.

DEPUTY CHIEF JUDGE ROLPH: Well, if establishment of jurisdiction is a prerequisite to referral, then hasn't that already been done and conclusively determined?

MR. WHITLING: Well, in an ideal case, it would. But in this case, it clearly had not. We would also emphasize, of course, that the rules themselves do not govern the statute, but that, of course, is readily apparent, and in our submission it's the statute that governs.

And related to your earlier point, in terms of the comparisons to the UCMJ context, we would simply emphasize that paragraph 2, which is present in 948a, is not present in the UCMJ and there is no equivalent provision in the UCMJ. Similarly, of course, we emphasize 948d(c), which you alluded to earlier, sir, respecting the fact that a CSRT determination is dispositive for the purposes of

jurisdiction. That is another provision which is not present in the UCMJ. And so in our submission, Congress has clearly indicated that it is to be another tribunal to make that determination.

DEPUTY CHIEF JUDGE ROLPH: As I look at Section 1 there of 948a -- as a former trial judge, I'm looking at language that establishes *in personam* jurisdiction over an accused before a Military Commission. Automatically what jumps into my mind is if that's the language that establishes *in personam* jurisdiction over an accused before the military commission I'm presiding over, and somebody challenges jurisdiction, I want to go to that language to determine whether the government can-- can meet the requirements for *in personam* jurisdiction. If it's a perquisite for referral, can I ever do that; can I ever consider a motion to dismiss?

MR. WHITLING: Well, it's difficult to imagine how that might arise, but, I think I can only answer your question by going back to what I've already said, and that is, that this particular case is different from a typical trial situation, the type of case which you may be thinking of, sir. In this case, the statute clearly contemplates----

DEPUTY CHIEF JUDGE ROLPH: I think I'm thinking about every case that comes before a criminal court that asserts criminal jurisdiction over an accused through certain statutory language where an accused who doesn't feel they meet the statutory language for *in personam*

jurisdiction wants to contest that and has a right to contest it by this mechanism we call a motion to dismiss for lack of jurisdiction. Courts across the land hear those motions every day and decide them through evidence, findings of fact, conclusions of law, subject to appeal. Why-- why can't a Military Commission do the exact same thing, and did Congress really contemplate a system that would preclude Mr. Khadr-- or, excuse me, preclude that situation?

MR. WHITLING: Well in our submission, that is the case, sir. The MCA obviously is a unique piece of legislation. A Military Commission is not like an ordinary criminal court. Its jurisdiction is strictly limited and----

JUDGE FRANCIS: Can I ask, what meaning would you then give to-- because those two provisions are in the disjunctive-- what meaning would you give to sub-item 1, if we read it as you suggest?

MR. WHITLING: Well----

JUDGE FRANCIS: What is the purpose of sub-item 1, if the Military Commission itself cannot determine whether it has *in personam* jurisdiction over the accused?

MR. WHITLING: Well, it appears to be indicative of the issue that's going to be determined prior to the trial. It is-- it is a definition----

JUDGE FRANCIS: But in sub-division 2, they talk about some other competent tribunal, in addition to CSRTs, so that-- would it

now allow, I mean cover the situation you are just talking about in terms of----

MR. WHITLING: Well, Congress in our submission has clearly directed that there must be essentially a revised CSRT system that is going to make a new type of determination that has not been made previously. Our submission is that essentially this is guidance in terms of what type of determination has to be made in order for the Military Commission to have jurisdiction over an accused.

JUDGE FRANCIS: So, where does sub-division 1 fit in then? What's the purpose right now if we read it as you suggest?

MR. WHITLING: It is a definition which ought to be applied by a CSRT.

JUDGE FRANCIS: Even though it's in the disjunctive?

MR. WHITLING: Yes, sir. Now there is a disjunctive "or" between the two paragraphs. We recognize that. Our submission quite simply is the word "or" itself is not an expressed conferral of jurisdiction. It is a single term in isolation. Reading the scheme of the act as a whole, particularly in light of international law, and the Geneva Conventions, and other provisions of the Act, it's our submission that the determination has to be made prior to the trial by a separate tribunal.

JUDGE HOLDEN: When does the trial begin? What's the defense's position on when the trial begins, because Mr. Kadhr has not been arraigned yet?

MR. WHITLING: Yes, sir, my understanding under Rule 707 is that the trial begins at the time of an arraignment.

DEPUTY CHIEF JUDGE ROLPH: I'm having some trouble with the logic between your assertion that this status determination is a prerequisite for referral and then your other assertion that the CSRT determination of unlawful enemy combatant status should not be dispositive. Can you comment on that?

MR. WHITLING: Well, sir, in terms of the referral, and you know, I should note there is nothing in the Act which expressly says the determination has to be made prior to the referral. Certainly the Act does indicate that prosecution is willing to be brought before the Commission on the basis of an unlawful-- determination of unlawful enemy combatant status. It is possible that a referral could be made without such determination having been rendered at that time, presumably. There is nothing in the Act which specifically speaks to that issue.

JUDGE HOLDEN: But in this particular case and your co-counsel pointed out that the procedures for the Commissions are based on those of court-martial. In our Rule for Court-Martial 406, the staff judge advocate provides pretrial advice to the convening authority,

and if you contrast those elements in the pretrial advice, with the exception of one additional element, they are the same. General Hemingway's pretrial advice to Miss Crawford referring the case, says that "appellate is an unlawful enemy combatant," and she refers the case to trial. So that matter is now before the court.

So at this point, I'm having trouble following why Judge Brownback didn't abuse his discretion. As you pointed out, the Military Commission did not have jurisdiction. My question in response to that is, how did it know? He didn't hear any evidence. I think for purposes of argument, the CSRT determination of "enemy combatant" is not only not dispositive, it's not helpful.

MR. WHITLING: Well as Judge Brownback noted, there was simply no evidence led before him as to the existence of a previous determination by CSRT or any other competent tribunal which supported that assertion.

JUDGE HOLDEN: That he's an "unlawful enemy combatant," right. But my question to you is why can't-- and that's why we're here-- why can't Judge Brownback conduct the hearing as you would under the Rules for Courts-Martial 104 as a preliminary matter and determine whether an appellate is an "unlawful enemy combatant." Why can't he determine it himself?

MR. WHITLING: Well, I think that leads us into the-- what we had referred to quite extensively in our argument under the "charming

Betsy principle" and the relevant provisions of the Geneva Convention and in particular Article 45 which Judge Francis referred to earlier.

Just at the outset before turning briefly to the Geneva Conventions, I would just like to emphasize, of course, that notwithstanding 948b(g), it's our-- we are not attempting to invoke the Geneva Conventions directly, we are saying that Congress clearly had them in mind when it drafted the MCA and it was intended to be consistent with those Geneva Conventions.

The jurisdictional provisions of the MCA clearly mirror those from the Third Geneva Convention on prisoners of war. In particular, the MCA's definition of lawful enemy combatant in 948a(2) clearly tracks the language of Article 4 of GC 3. Similar 948d(b) which provides that a Military Commission may not try lawful enemy combatants tracks the language of Article 102. We point out in our brief that pursuant to Article 45 sub 2 of the first additional protocol to the Geneva Conventions, the status determination as to whether or not a prisoner is entitled to prisoner of war status, is to be made wherever possible prior to the trial.

JUDGE HOLDEN: Well, you've already conceded he hasn't even been arraigned. So why can't Judge Brownback make that decision?

MR. WHITLING: Well, it's a highly unusual circumstance in this case in that Judge Brownback raised the issue himself *sua sponte* before the arraignment-- before Mr. Khadr had any-- was even

represented by counsel at the time. It's clearly going to be a highly unusual situation when that's going to occur. In the *Hamdan* case, for example, the same determination was made. The arraignment did effectively occur, and then a motion was heard. That's what one would expect to happen----

JUDGE FRANCIS: Well counsel, we're on this case here. In this particular case, there wasn't an arraignment and as you've indicated in your argument, trial does not begin until arraignment, so doesn't that solve for this particular case the requirements that you would----

JUDGE HOLDEN: Can you address your opponent's point that trial begins when evidence is presented on the merits?

MR. WHITLING: Well in terms of that question, I guess the best I could do is to refer the Rule 707 which says trial commences at the time of the arraignment, and so in our submission that-- that is the commencement of the trial. Now, in terms of Judge Francis' question, I suppose that in Mr. Kadhr's case a determination made, say a few minutes before the arraignment would technically meet the requirement of Article 45c(2). But----

JUDGE FRANCIS: Doesn't that take away your argument for this case?

MR. WHITLING: Well, no sir.

JUDGE FRANCIS: Doesn't that take away your argument concerning Article 45?

MR. WHITLING: Well, no, sir, because when Congress enacted the MCA, it wasn't obviously only thinking of one particular case. It was looking at international law, and the Geneva Conventions, protocol thereto, and Congress said, "There shall be a determination prior to the commencement of the trial" in our submission.

JUDGE FRANCIS: Again, trial, by your definition begins at arraignment. So as long as the determination is made by someone, perhaps the military judge, perhaps the CSRT, prior to trial, prior to arraignment, then the requirements of the MCA are also met?

MR. WHITLING: Well, I guess the point I'm making, sir, is that Congress would be unlikely to consider the situation of the highly exceptional circumstance of this case where there's a *sua sponte* motion before-- before the detainee is even represented by counsel or has entered a plea and been arraigned. So when Congress is writing the statute, it's saying, "We're going to have a proceeding prior to the arraignment by another tribunal, CSRT, or other another competent tribunal to make that determination." So, would-- would the requirement be met in this particular case, given the unusual circumstances of the motion? Yes, it would. Would that occur in the typical case? No, it would not.

JUDGE FRANCIS: Boy, that sounds like a concession for this case though, doesn't it? I mean, if part of your-- at least in terms of that part of the argument, if a large part of the argument is that you have to make it by a separate tribunal prior to trial, and that's based on Article 45, and now we're saying, well this is prior to trial. Remember, in any case we are dealing with you have to look at the circumstances of this particular case.

MR. WHITLING: Okay, the other-- the other consideration that comes into play, of course, is-- is Article 102 which is closely related to Article 45. What that provision states is that, "A detainee who is entitled to prisoner of war status may not be tried by a tribunal essentially with fewer procedural safeguards than those which are applicable to our own forces." Now, if a detainee were required to challenge-- would be brought-- could be brought before that court and be required to challenge the jurisdiction before that same court which he may not be brought before, that is, what I'll call "an inferior tribunal," then that essentially frustrates the purpose of this prohibition. He could be brought before the court, he would have to prove before that inferior tribunal that he is entitled to POW status, and in our submission that's contrary to the purpose of these provisions.

I would like to try to move on quickly to some of the-- some of the constitutional points that we have raised in our brief.

Now obviously, as we're all aware, the Supreme Court will be rendering a decision in the fall on a related case, which may or may not determine whether or not the Constitution does apply to detainees in Guantánamo Bay. For present purposes, I submit that it suffices to emphasize that in 2006, when the new MCA was enacted, there was certainly a serious question in that respect. And for that reason, there was at least what has been referred to as a "grave doubt" as to whether or not the Constitution could be invoked by the detainees in Guantánamo Bay. The particular Constitutional principles that we refer to in this regard include that imposed by the separation of powers and the prohibition against *ex post facto* laws and bills of attainder.

A determination of criminality is a quintessential judicial function. Congress must not be presumed to have intended to usurp this function by deeming whole classes of enemy combatants to be unlawful enemy combatants years after hearings were held, years after the determinations were made. Further, Congress may not be presumed to have legislatively determined the guilt of a class of individuals without the protections of a judicial-- a judicial trial, much less on a retroactive basis.

A further issue that I would like to address, and we do think it's an important one although it was not raised in the court below it, and in this respect we emphasize that Mr. Khadr was not

represented by counsel at that time and did not raise all of the arguments which could have been raised in terms of that tribunal's jurisdiction over him. And this harkens back to the point I made a moment ago, that the allegations----

DEPUTY CHIEF JUDGE ROLPH: We're up on a government appeal--interlocutory appeal. Isn't that always the case in an interlocutory appeal that there may be outstanding issues pending litigation? Why should we concern ourselves with this stuff that wasn't litigated yet? I'm sure there's plenty to litigate if this case goes back to Judge Brownback.

MR. WHITLING: Well, sir, in our submission, it's a very important issue that should be determined at this point.

DEPUTY CHIEF JUDGE ROLPH: How can we determine it without a fully developed record and not knowing what those issues are?

JUDGE FRANCIS: And not having the power to make determinations of facts, and limited to issue of the law?

MR. WHITLING: Well, in our submission, the facts which are relevant to this particular issue are not in dispute, they simply pertain to the age of Mr. Khadr at the time he was----

DEPUTY CHIEF JUDGE ROLPH: I'm going to tell you just right now, counsel, we're not going to hear argument on the age issue. That has not been litigated at the trial level, we don't have a fully

developed record, it was raised sort of *sua sponte* by you in your pleadings, but we're not going to hear argument on that.

MR. WHITLING: Yes, sir. Sir, perhaps I could-- perhaps I could then just speak briefly before I conclude. In relation to what the government relies on in terms of the parenthetical language of paragraph 1 of 948a. Again, as I said a moment ago, Congress should not be presumed to have made blanket determinations in respect to individuals and in relation to proceedings which were concluded several years earlier. Just at the outset, we would like to submit that that approach is not dictated by the language of the statute in any event. Essentially, the government interprets this provision as creating a separate subparagraph, a separate freestanding category for the individuals or classes of individuals that are identified in parentheses; and in a manner which is completely divorced from the remaining language of the provision.

Our submission is that the provision simply states that the task which is set out in the first half of that paragraph must also be applied to the classes of persons who are identified in parentheses. Again, referring to the Geneva Conventions we emphasize that in the ***Hamdan*** case, Justices Souter and Ginsburg in their concurring reasons pointed out that determinations as to the lawfulness of a detainee's combatant status must be made on an individualized basis. The blank -- the government's apparent

approach or policy of issuing blanket determinations was squarely rejected by the court in that case and in our submission that is what is required by Article 5, as well as Article 45.

Sirs, I obviously have a couple of minutes extra, but unless you have any further questions, those are all our submissions.

JUDGE FRANCIS: Just a quick question going back to Article 45. The international protocols have never been ratified by the Senate; correct?

MR. WHITLING: That's true, sir.

JUDGE FRANCIS: So, from your brief the only application of the provisions of that article are through customary international law?

MR. WHITLING: Yes, sir. They've also been-- they've been abutted in certain regulations as well, but they're not applicable to this situation.

JUDGE FRANCIS: If we were to read Section 948a(1)(a)i of the MCA as allowing the Military Commission to make a determination on jurisdiction at the outset, and if we assume for the sake of argument that Article 45 reads as you suggest, so the two provisions would be in direct conflict, which of those two provisions would take precedence?

MR. WHITLING: Well, needless to say, sir, the language of the statute would take precedence over customary international law, and if that's your question, of course, the answer is quite obvious. Our

submission is quite simply that any ambiguities in the statute, any doubts which are contained in the statutes should be interpreted in a manner which is consistent with customary international law. And as you've heard me say, sir, our submission is that Article 45-1 requires a determination in advance of the trial by a separate tribunal.

DEPUTY CHIEF JUDGE ROLPH: In your last 15 seconds, let me just clarify in regard to your attempt to raise the argument that Mr. Khadr was a juvenile at the time of the alleged offenses, that appellate courts traditionally only hear matters that are ripe for appeal and a matter traditionally is only ripe for appeal when it's been raised at the trial level, litigated at the trial level, both parties having an opportunity to fully develop the record and that is an additional point which facilitates exhaustion of remedies and judicial economy. I just wanted to fully explain why.

MR. WHITLING: Thanks very much. We have a bit of a different rule in Canada, but----

DEPUTY CHIEF JUDGE ROLPH: Understand.

MR. GILLIGAN: Your Honor, could I have a 10-minute break to consult with counsel?

DEPUTY CHIEF JUDGE ROLPH: Certainly. Court will stand in recess for 10 minutes.

[The court recessed at 1143, 24 August 2007.]

[The court was called to order at 1155, 24 August 2007.]

DEPUTY CHIEF JUDGE ROLPH: Please be seated. Mr. Gilligan, you may proceed.

MR. GILLIGAN: Your Honors, I think if you look at how Article 45 contemplates that as long as you have a decision made prior to the introduction of the evidence, that is what is needed.

The question was raised about the question of notice prior to referral of whether you need some sort of notice prior to that. Mr. Khadr certainly did know that there was a process in place at that time, the President's Order; and also that he could be subject to the law of war. So even at the time of the CSRT he had knowledge that he might be in jeopardy for criminal activity.

The other thing that came into play too, on that question of the referral----

DEPUTY CHIEF JUDGE ROLPH: I guess, Mr. Gilligan, the issue raised was not his knowledge generally that he's subject to the law of war, but his knowledge of what the CSRT was doing at the time in 2002; were they making the determination for purposes of GC application, or a determination to subject him to criminal jurisdiction by Military Commissions which didn't even exist yet under the MCA.

MR. GILLIGAN: Would you mind if I have Mr. Edney respond to that?

DEPUTY CHIEF JUDGE ROLPH: Did Mr. Edney comply with the rules of court to request oral argument before us?

MR. GILLIGAN: No, he did not. No, unfortunately.

DEPUTY CHIEF JUDGE ROLPH: Then we'll allow you to file supplemental pleadings on that issue.

MR. GILLIGAN: Okay. On the-- on the question of having a hearing before a referral too, I would say, just as in the case of a Reservist who doesn't know whether he's going to be-- they don't have to have prior to a referral a hearing to determine were they on active duty or not active duty. The same would be true as to a person who's alleging they had a discharge certificate. Neither of those hearings would have to be done prior to a referral in the case.

The other question that was raised here is the question of dispositive provision, and I would say that Congress anticipated here that there would be commission hearings on individuals who went before a CSRT and those that did not. Those who went before a CSRT and there was a finding they were unlawful enemy combatant, meant it was dispositive, that is, not necessary for anything else to be done prior to determining that there’s jurisdiction over the person.

DEPUTY CHIEF JUDGE ROLPH: But would you concede that in light of that dispositive determination that Mr. Kadhr could still go before a commission and challenge that decision?

MR. GILLIGAN: No, we wouldn't concede that.

DEPUTY CHIEF JUDGE ROLPH: You would not concede that?

MR. GILLIGAN: No.

DEPUTY CHIEF JUDGE ROLPH: And so in this case, again we want to focus on the facts in this case. In 2002 when a CSRT is held and he is never advised that this might subject you to criminal jurisdiction and he's never advised that they're making a determination and the fact they don't make a determination of unlawful enemy combatant status explicitly; that that 2002 decision could later roll up against him a number of years later as a dispositive determination of jurisdiction that he could not attack?

MR. GILLIGAN: I would ask Your Honors to do alternative holdings. Yes, it is dispositive, but if we go back to what we prefer in this particular case, we'd like you to give what the defense is asking for here. They want notice. They want the burden on the government. They want to have a right to a lawyer, the right to inspect all the evidence, and many other rights that they will get at a preliminary determination between-- before Judge Brownback.

DEPUTY CHIEF JUDGE ROLPH: So you're asking that it's not dispositive-- or you're saying that it's not dispositive. In the alternative your argument is that he'll get all those rights before Judge Brownback?

MR. GILLIGAN: Yes, he will get all the rights before Judge Brownback.

And I want to point out, too, is the differences that are present, the differences in the statutory definition as a question of unlawful enemy combatant and the CSRT definition of enemy combatant. As an initial matter, the Act resolves the question of unlawfulness. The CSRT definition seeks a determination of a person's association with al Qaeda or the Taliban. Congress, in this statutory parenthetical that I gave to you here, determined that al Qaeda and the Taliban were unlawful forces. That is a determination----

DEPUTY CHIEF JUDGE ROLPH: That's the question I asked you last time. You were going to look at it over the break----

MR. GILLIGAN: Yes.

DEPUTY CHIEF JUDGE ROLPH: ---- In fact, where in the Presidential memo does it declare that al Qaeda is-- the members of al Qaeda are unlawful enemy combatants? It says it regarding the Taliban, but in regard to al Qaeda, if I'm right, it only says that-- that members-- it only makes reference to GC application in regard to members of al Qaeda.

MR. GILLIGAN: That's what it says, is that they're not a high contracting party, and they're unlawful----

DEPUTY CHIEF JUDGE ROLPH: So without expressly stating-- the President stating, that members of al Qaeda in that memo have been determined by me to be unlawful enemy combatants, why do we care about the Presidential memo?

MR. GILLIGAN: Let me consult with Mr. Edney. Could I take a second?

[Mr. Gilligan consulted with Mr. Edney.]

MR. GILLIGAN: In the 2002 memo it says they're not unlawful because they're not a high contracting party, and it says, "and for other reasons." And those would be-- the other reasons would be the categories you see in Article 4.

DEPUTY CHIEF JUDGE ROLPH: Say that again? They're not unlawful because they're not a member of a high contracting party?

MR. GILLIGAN: And it says, "for other reasons." Meaning that the al Qaeda is not an organization that wears a distinctive uniform, carries an arms----

DEPUTY CHIEF JUDGE ROLPH: ----Sure, sure, I understand that point for purposes of the Geneva Convention application----

MR. GILLIGAN: ---- Okay.

DEPUTY CHIEF JUDGE ROLPH: ---- but-- but again, I'm asking somebody to point me to the word where it says, "al Qaeda members are unlawful enemy combatants" in the Presidential memo.

MR. GILLIGAN: We'll have to give you a supplemental on that.

JUDGE HOLDEN: Mr. Gilligan, even if it did, how do you get past the constitutional issue raised by the defense that basically is satisfying an element of the offense -- or jurisdiction and an element of the offense by Presidential memo? Because in an armed

conflict all soldiers who kill people, who are lawful combatants have immunity. So at trial, one of the things-- because Mr. Kadhr is charged with murder-- one of the issues is going to be whether he enjoys this immunity as a lawful enemy combatant. So then if the Presidential memo said he belongs to this group, they are unlawful enemy combatants, have you now bypassed proof of an entire element of the offense by Presidential memo?

MR. GILLIGAN: We have not, because the way the specification reads, indicates is that he is an "alien unlawful combatant," and I think if we can prove beyond a reasonable doubt he committed the five offenses, that would automatically show that he's an unlawful combatant.

JUDGE FRANCIS: Doesn't his status then, because of the way it's applied and because of these other reasons, his status as an unlawful alien enemy combatant become an element of the offense?

MR. GILLIGAN: We take the position that that's not the case. The Manual says that it's not an element of the offense. I suggest the defense is going to argue the way we have it in the specification that it is an element, has to be instructed upon, and I suggest if the judge does instruct on it, that would eliminate any issue here as to whether he had an appropriate hearing by a preponderance there being beyond a reasonable doubt.

JUDGE FRANCIS: So how would you treat it then as a defense as opposed to an element of the offense?

MR. GILLIGAN: He could-- he could raise it as a defense and then we will have to-- yes, that's a possibility.

JUDGE HOLDEN: Doesn’t that then undercut some of the-- if the CSRT doesn't say "unlawful enemy combatant," because if they did-- so if somebody tomorrow changes it, and now all of a sudden instead of "enemy combatant," they determined "lawful" or "unlawful enemy combatants," and you go back to language that says the CSRT determination is dispositive, does not that determination then become dispositive for some reasons, but not for others? In other words, it might get you past the jurisdiction issue, but it doesn't defeat a defense because you can raise a piece of paper and say, "It says here it's dispositive." You can't argue that you are a lawful enemy combatant because I've got this piece of paper.

MR. GILLIGAN: My memory of the Manual that allowed that-- to be back to Judge Francis-- allowed that to be raised as a defense in the case.

JUDGE HOLDEN: So, dispositive for some purposes but not for others, if it said what we needed it to say?

MR. GILLIGAN: It places the dispositive in the sense that it placed the burden on the defense to go forward with the defense once

they've gone forward with the defense then the burden would be on us to disprove it beyond a reasonable doubt.

As I say, we conclude and ask you to give what the defense asked for. And even though they don't want Judge Brownback-- is to have Judge Brownback to make the determination. In the alternative to say that the CSRT and the finding of enemy combatant, together with R-1 satisfies the statute. Thank you very much.

DEPUTY CHIEF JUDGE ROLPH: Thank you very much, counsel. Excellent arguments on both sides and for your outstanding briefs received today. The court will take the case under advisement and we will deliver our decision in due course.

We'll stand in adjournment.

[The court is adjourned 1203, 24 August 2007.]